
"Allegations of maladministration in the matter between Vuna Health Logistics and the Mpumalanga Department of Health"

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR PROCUREMENT PROCEDURES AND FRUITLESS AND WASTEFUL EXPENDITURE BY THE MPUMALANGA DEPARTMENT OF HEALTH
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Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1) (c) of the Constitution following an investigation into allegations of irregular procurement and fruitless expenditure by the Mpumalanga Department of Health (the Department).

(iii) On 25 May 2016, I received a complaint from Vuna Health Logistics (the Complainant) who was one of the service providers that submitted a bid to the Department for a tender, with a request that I must intervene and investigate allegations of maladministration, irregular procurement procedures, fruitless and wasteful expenditure by the Department.

(iv) In essence the Complainant alleged that:

(aa) The Department awarded a tender for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex on 10 September 2010; a bidder that was neither the highest ranking nor offered the best price. Amalgamated Logistics Mpumalanga (Pty) Ltd (Amalgamated Logistics) had achieved higher scores on the Department’s scoring system and a lower price than that offered by Safarmex;

(bb) Shortly after the award of the tender, Amalgamated Logistics launched an urgent application in which it sought to interdict the Department from implementing the bid until the outcome of the review application. An interim order was granted by Judge Preller in terms of which the Department was interdicted from appointing Safarmex;
(cc) In spite of the above judgement, the Department persisted in implementing the services of Safarmex, but on a month to month basis;

(dd) Amalgamated Logistics then launched a second urgent application to interdict the Department from utilising the services of Safarmex on a month to month basis and their application was successful;

(ee) The implementation of this order was suspended by an appeal by Safarmex. However, the Department has taken no further steps to challenge the appeal and accordingly Safarmex continued to rendered services to the Department;

(ff) The Department incurred fruitless expenditure by pursuing unnecessary litigation;

(gg) The Department irregularly appointed Safarmex for the same tender in 2015; and

(hh) The appointment is surrounded by suspicions of corruption as it seems that an official at the Department has vested interest in Safarmex.

(v) On analysis of the complaint, the following issues were considered and investigated:

(a) Whether the Department irregularly appointed Safarmex on a month-to-month contract basis to render management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010;

(b) Whether the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter;
(c) Whether the Department irregularly awarded tender number HEAL/024/15/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex in 2015; and

(d) Whether Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the taxpayer and any other bidder suffered prejudice as a result of the conduct of the Department?

(vi) The investigation process included an exchange of correspondence as well as meetings and interviews conducted with the relevant officials of the Department, as well as an analysis of the relevant documents, research and the application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been maladministration, prejudice and/or improper conduct by the Department, were principally those imposing administrative standards and procedures that should have been complied with when the Department appointed Safarmex.

(viii) Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Department should have complied with and the impact on the Complainant, I therefore make the following findings:

(a) Regarding whether the Department irregularly appointed Safarmex on a month-to-month contract basis to render services for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010.

(aa) The allegation that the Department irregularly appointed Safarmex on a month-to-month contract basis to render services of management of warehousing,
procurement and distribution of pharmaceutical and surgical sundries in 2010, is substantiated.

(bb) The Department failed to re-adjudicate the tender as was ordered by the court but focussed on the continued litigation in order to justify its decision to appoint Safarmex on a month to month basis. It was therefore unlawful for the Department to continue utilizing the services of Safarmex after the court had declared the processes followed in appointing Safarmex irregular.

(cc) The Department’s failure to follow the normal procurement procedure in appointing a service provider on a month-to-month contract was in contravention of section 217(1) of the Constitution and section 38(1)(a)(iii) of the PFMA.

(dd) The Department’s failure to re-adjudicate the tender for more than seven (7) years i.e. from 2010 until 2018 is in violation of the Order of the High Court.

(b) Regarding whether the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter.

(aa) The allegation that the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter, is substantiated.

(bb) The Department’s continuous litigation which involved several applications for leave to appeal to all three Courts (North Gauteng High Court, Supreme Court of Appeal and the Constitutional Court) being dismissed with costs including costs of Counsel, resulted in the Department having to incur fruitless and wasteful expenditures which could have been avoided.
(cc) Therefore, the Department’s conduct contravened Section 38(1)(c)(ii) of the PFMA which required the Accounting Officer to ensure that fruitless and wasteful expenditures is prevented.

(c) Regarding whether the Department irregularly awarded tender number HEAL/024/15/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex in 2015.

(aa) The allegation that the Department irregularly appointed Safarmex on a tender for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2015, is substantiated.

(bb) As confirmed by the Auditor General, the tender for bid number HEAL/024/15/MP was not properly advertised, evaluated and scored. The Auditor General’s findings together with the legal opinion and the recommendations of Mr Ian Small-Smith led to the cancellation of the tender awarded to Safarmex.

(cc) Failure by the Department to advertise the tender in the Government Tender Bulletin for a minimum period of 21 days before closure is in violation of Treasury regulation section 16A6.3(c). Also failure to evaluate all tenders that have achieved the minimum qualification score for functionality in terms of the preference points system is in violation of paragraph 4(5) of the Preferential Procurement Regulation.

(dd) The conduct of the Department is also in contravention of section 217 of the Constitution and section 38(1)(a)(iii) of the PFMA in that it was against the principle of fairness, equity, transparency, competitiveness and cost-effectiveness.
(d) Regarding whether Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the taxpayer and any other bidder suffered prejudice as a result of the conduct of the Department.

(aa) The allegation that Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the taxpayer and any other bidder might have suffered prejudice, is substantiated.

(bb) The conduct of the Department and in particular the former HODs Dr JJ Mahlangu and Mr Mnisi and the current HOD Dr Mohangi, in the irregular awarding of tenders HEAL/024/10/MP and HEAL/024/15/MP to Safarmex respectively, on two occasions and the continuous litigation to set aside the court order, resulted in the taxpayer suffering financial prejudice and the other bidders partiality as a result of the failure by the Department to objectively adjudicate their bids and thus forbidding them probable business opportunities.. The conduct of the HODs further resulted in the Department incurring fruitless and wasteful expenditure amounting to a total of R 1 040 524 662.37 in month to month contracts. This amount excludes the litigation costs which is R 822 210.71.

(cc) The conduct of the Department and particularly those of the HODs was in contravened of its own Procurement Policy and section 38(1)(a)(b) of the PFMA by permitting a fruitless and wasteful expenditure, which came as a result of the month to month contracts and continued litigations.

(ix) In light of the above, and having taken into account evidence before me, the appropriate remedial actions that I am taking in terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:
(a) The Director General of Mpumalanga Provincial Government must:

(aa) Within 60 working days from the date of this report, ensure that an investigation into the irregular expenditure is conducted and that appropriate disciplinary steps are taken against all implicated officials.

(bb) Within 30 working days from the date of finalisation of the investigation, ensure that the Department declares the irregular expenditure in their financial statement to the Provincial Treasury.

(cc) Within 30 working days of finalisation of the investigation, further ensure that the matter is referred to the Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit in terms of Section 6(4) (c) (ii) of the Public Protector Act for further investigation and recovery of losses.

(b) The Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit must:

(aa) Investigate any alleged criminal conduct against implicated parties for financial mismanagement in violation of the PFMA, especially the litigation costs incurred by the Department and the irregular extension of the month to month contract to Safarmex.

(bb) To recover through civil litigation any amount incurred as wasteful and fruitless expenditure from the former HODs Dr JJ Mahlangu and Mr Mnisi and the current HOD Dr Mohangi.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR PROCUREMENT PROCEDURES AND FRUITLESS AND WASTEFUL EXPENDITURE BY THE MPUMALANGA DEPARTMENT OF HEALTH

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial action:

1.2.1. The Member of the Executive Council (MEC) for the Department of Health in Mpumalanga Province, Ms Sasekani Manzini;

1.2.2. The Acting Director-General of the Mpumalanga Provincial Government, Mr K.M Mohlasedi;

1.2.3. The Head of Department of the Mpumalanga Department of Health, Dr Savera Mohangi.

1.2.4. A copy of the report is also provided to Vuna Healthcare Logistics, the Complainant to inform them about the outcome of my investigation.

1.3. The report relates to an investigation into the alleged maladministration, fruitless and wasteful expenditure and tender procedures by Mpumalanga Department of Health (the Department) when they appointed Safermex to render management
of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010.

2. **THE COMPLAINT**

2.1. On 25 May 2016, my office received a complaint from Knowles Husain Lindsay Inc. Attorneys on behalf of Vuna Healthcare Logistics (the Complainant) who was one of the service providers that submitted a bid to the Department for a tender to render management of warehousing, procurement and distribution of pharmaceutical and surgical sundries, with a request that I must intervene and investigate allegations of maladministration, irregular procurement procedures, fruitless and wasteful expenditure by the Department. The Complainant alleged that: the Department irregularly appointed Safermex for the tender in 2010.

2.2. The Department awarded a tender for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safermex on 10 September 2010; a bidder that was neither the highest ranking nor offered the best price. Amalgamated Logistics Mpumalanga (Pty) Ltd (Amalgamated Logistics) had achieved higher scores on the Department's scoring system and a lower price than that offered by Safermex;

2.3. Shortly after the award of the tender, Amalgamated Logistics launched an urgent application in which it sought to interdict the Department from implementing the bid until the outcome of the review application. An interim order was granted by Judge Preller in terms of which the Department was interdicted from appointing Safermex;

2.4. In spite of the above judgement, the Department persisted in implementing the services of Safermex, but on a month to month basis;
2.5. Amalgamated Logistics then launched a second urgent application to interdict the Department from utilising the services of Safarmex on a month to month basis and their application was successful;

2.6. The implementation of this order was suspended by an appeal by Safarmex. However, the Department has taken no further steps to challenge the appeal and accordingly Safarmex continued to rendered services to the Department;

2.7. The Department incurred fruitless expenditure by pursuing unnecessary litigation;

2.8. Bearing the above, the Department has irregularly appointed Safarmex for the same tender in 2015; and

2.9. The appointment is surrounded by suspicions of corruption as it seems that an official at the Department has vested interest in Safarmex.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1. The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4. The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.5. In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11(5); 2016(5) BCLR 618 (CC); 2016(3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers of the public protector:

3.5.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.2. An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the value underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.3. Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in
terms of the interim Constitution. However, sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.4. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.5.5. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.5.6. The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.7. Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(a));

3.5.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d))
3.5.9. "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.7. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101); (a) Conduct an investigation; (b) Report on that conduct; and (c) To take remedial action.

3.8. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (Paragraph 104);

3.9. The Mpumalanga Department of Health is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.10. The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.
3.11. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. The rationale of this report is to identify possible maladministration by the Department, to determine if the Complainant was prejudiced, and to direct remedial action to remedy the identified maladministration and prejudice, if any is found.

4.1.2. The investigation also entailed interviews, meetings and correspondence with the Complainant and relevant officials of the Department as well as research, perusal of relevant documents/correspondence and analysis and application of all relevant laws, policies and related prescripts. This was done with a view to making a determination of maladministration, prejudice and impropriety in terms of powers conferred on me by the Constitution and Public Protector Act.
4.1.3. My investigation team also interviewed the HOD of the Department, Dr S Mohangi, on 18 May 2017.

4.1.4. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to investigate and report my findings regarding any complaint lodged.

4.2. Approach to the investigation

4.2.1. When I conduct an investigation, the mandate given to me, requires that I conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equality, good administration and proper conduct.

4.2.2. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1. What happened?

4.2.2.2. What should have happened?

4.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.2.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced
during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department incurred fruitless and wasteful expenditure and failed to follow procurement procedures.

4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department to prevent maladministration.

4.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration. Where a complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.6. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.
4.3. On analysis of the complaint, the following issue was considered and investigated:

4.3.1. Whether the Department irregularly appointed Safarmex on a month-to-month contract for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010;

4.3.2. Whether the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter;

4.3.3. Whether the Department irregularly awarded tender number HEAL/024/15/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex in 2015; and

4.3.4. Whether Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the Department and any other bidder suffered prejudice as a result of the conduct of the Department.

4.4. The Key Sources of Information

4.4.1. Documents

4.4.1.1. A copy of the Applications for leave to Appeal for 2013;

4.4.1.2. A copy of the High Court Judgment for Vuna Health Care Logistics (Mpumalanga) (Pty) Ltd v MEC of Health and Social Development, Mpumalanga Provincial Government and Others (5948/2011) ZAGPPHC 126 (22 June 2012);

4.4.1.3. A copy of the List of awarded bidders, undated;

4.4.1.4. A copy of the Temporary Service Level Agreement between the Department and Safarmex Joint Venture dated 05 September 2011;
4.4.1.5. A copy of a memorandum from the Acting Director: Internal Audit, Mr MJ Maluleka, to the Head of Department, Dr S Mohangi, dated 17 October 2016;
4.4.1.6. A copy of a letter from the Department to Safarmex, dated 13 September 2010;
4.4.1.7. A copy of a letter from the Department to Safarmex, dated 07 October 2013;
4.4.1.8. A copy of a letter from the Department to Safarmex, dated 02 August 2010;
4.4.1.9. A copy of the letter from the Acting Director: Internal Audit, Mr MJ Maluleka, to the HOD, Dr S Mohangi, dated 11 October 2016;
4.4.1.10. A copy of the Supreme Court of Appeal of South Africa First Respondent Answering Affidavit, dated 05 October 2012;
4.4.1.11. A copy of the Application for leave to Appeal, lodged by the Department, dated 07 September 2012;
4.4.1.12. A copy of the order on the Departments Application for leave to Appeal;
4.4.1.13. A copy of the Applicants (the Department) Heads of Argument for a leave to appeal to a full bench, dated 08 August 2012;
4.4.1.15. A copy of Ms SR Morgan’s Replying Affidavit, dated 18 October 2012;
4.4.1.16. A copy of Ms SR Morgan’s Founding Affidavit, undated;
4.4.1.17. A copy of the Vulindlela Report, dated 05 October 2012;
4.4.1.18. A copy of the order for the application for leave of appeal, dated 08 August 2012;
4.4.1.19. A copy of Vuna Health Logistics tender receipt certificate, dated 21 July 2015;
4.4.1.20. A copy of JSX Management Services tender receipt certificate, dated 21 July 2015;
4.4.1.22. A copy of the Tender Specification for the Outsourcing the Management of Procurement, Warehousing and Distribution of Pharmaceuticals and Surgical Sundries for the Department of Health Mpumalanga Province for a period of (3) three years, undated;
4.4.1.23. A copy of the Bid Specification meeting held on 09 June 2015;
4.4.1.24. A copy of a memorandum from the Chief Financial Officer, Mr CB Mnisi, to the Head of Department, Dr AM Morake, dated 05 June 2015;
4.4.1.25. A copy of a memorandum from the Head of Department, Dr AM Morake, to the Chief Director: Nkangala District, Mr J Mothalamme, dated 08 June 2015;
4.4.1.26. A copy of a memorandum from the Head of Department, Dr AM Morake, to the Director: Infrastructure Planning, Mr M Phakathi, dated 08 June 2015;
4.4.1.27. A copy of a memorandum from the Head of Department, Dr AM Morake, to the Manager: Pharmaceutical Services, Ms L Mahlangu, dated 08 June 2015;
4.4.1.28. A copy of a memorandum from the Head of Department, Dr AM Morake, to the Manager: Supply Chain Management, Ms S Mokoena, dated 08 June 2015;
4.4.1.29. A copy of the attendance register for the Bid Specification Committee meeting, dated 09 June 2015;
4.4.1.30. A copy of the attendance register for the Bid Evaluation Committee meeting, dated 09 June 2015;
4.4.1.31. A copy of a letter from Head of Department, Dr AM Morake, to the Assistant Director: Contract Management, Ms I Mawela, dated 06 August 2015;
4.4.1.32. A copy of a letter from Head of Department, Dr AM Morake, to Ms HN Zitha, Department of Human Settlement, dated 21 August 2015;
4.4.1.33. A copy of a letter from Head of Department, Dr AM Morake, to Mr MD Ndlovu, Office of the Premier, dated 21 August 2015;
4.4.1.34. A copy of a letter from Head of Department, Dr AM Morake, to Mr J Sibandwe, Department of Education, dated 21 August 2015;
4.4.1.35. A copy of a letter from Head of Department, Dr AM Morake, to Ms L Mahlangu, Department of Health, dated 21 August 2015;
4.4.1.36. A copy of a letter from Head of Department, Dr AM Morake, to Mr JS Dlamini, Office of the Premier, dated 21 August 2015;
4.4.1.37. A copy of the minutes of the Bid Adjudication Committee meeting held on 14 September 2015 and signed on 19 October 2015;
4.4.1.38. A copy of attendance register for the Bid Adjudication Committee meeting held on 14 September 2015;

4.4.1.39. A copy of a letter from the Head of Department, Dr AM Morake, to the Director, Ms JP Hlatshwayo, dated 29 June 2015;

4.4.1.40. A copy of a letter from the Head of Department, Dr AM Morake, to the Deputy Director, Mr SR Shabangu, dated 29 June 2015;

4.4.1.41. A copy of a letter from the Head of Department, Dr AM Morake, to the Chief Financial Officer, Mr CB Mnisi, dated 29 June 2015;

4.4.1.42. A copy of a letter from the Head of Department, Dr AM Morake, to the Deputy Director, Mrs CT Mulungo, dated 29 June 2015;

4.4.1.43. A copy of a letter from the Head of Department, Dr AM Morake, to the Chief Director, Ms SE Motau, dated 29 June 2015;

4.4.1.44. A copy of a letter from the Head of Department, Dr AM Morake, to the Deputy Director General, Dr S Mohangi, dated 29 June 2015;

4.4.1.45. A copy of the Bid Evaluation Committee Report, dated 03 September 2015;

4.4.1.46. A copy of the Service Level Agreement between the Department and Safarmex, dated 21 October 2015;

4.4.1.47. A copy of the appointment letter from the Department to Safarmex, dated 01 July 2016;

4.4.1.48. A copy of Safarmex’ Quotation/ Proposal for outsourcing the Management of Procurement, Warehousing and Distribution of Pharmaceuticals and Surgical Sundries for the Department of Health, dated 01 July 2016;

4.4.1.49. A copy of a letter from the Department to Safarmex, dated 30 June 2016;

4.4.1.50. A copy of the report from the Auditor General with reference: COMAF no. 18 of 2016, dated 22 June 2016;

4.4.1.51. A copy of a letter from Ian Small-Smith, Attorney of the High Court, to Mr CB Mnisi, Deputy Director – General: Finance (CFO), dated 24 June 2016;

4.4.1.52. A copy of a memorandum from Mr CB Mnisi, Chief Financial Officer, to Dr S Mohangi, Acting Head of Department, dated 30 June 2016;
4.4.1.53. A copy of a memorandum from Mr CB Mnisi, Chief Financial Officer, to Dr S Mohangi, Acting Head of Department, dated 01 July 2016;
4.4.1.54. A copy of a letter from Safarmex to the Department, dated 23 September 2015;
4.4.1.55. A copy of an emailed statement from Ms Morgan (previous employee of the Department), dated 08 November 2017;
4.4.1.56. A copy of the Bid Bulletin Volume no. 245, dated 07 November 2016;

4.4.2. **Correspondence sent and received**

4.4.2.1. A copy of a letter dated 03 October 2016 from the Public Protector to the Department;
4.4.2.2. A copy of a letter dated 27 October 2016 from the Department to the Public Protector;
4.4.2.3. A copy of a letter dated 17 May 2017 from the Department to the Public Protector;
4.4.2.4. A copy of a letter dated 17 May 2017 from the Department to the Public Protector;
4.4.2.5. A copy of a letter dated 31 May 2017 from the Department to the Public Protector;
4.4.2.6. A copy of a letter dated 06 June 2017 from the Public Protector to the Department;
4.4.2.7. A copy of a letter dated 18 July 2017 from the Public Protector to the Department.

4.4.3. **Meetings held**

4.4.3.1. Meeting between the investigations team and the Department held on 30 May 2017.
4.4.4. Legislation and other prescripts


4.4.4.2. Public Finance Management Act, 1999;

4.4.4.3. Uniform Rules of Court; and

4.4.4.4. Department of Health Procurement Policy, 2015.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND THE CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1. Regarding whether the Department irregularly appointed Safarmex on a month-to-month contract or the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010:

Common cause issues

5.1.1. It is common cause that on 1 April 2010, the Department advertised tender number HEAL/024/10/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in the Mpumalanga Province for a period of three years on the 2010 Government Tender Bulletin for an amount of R6 217 000.00.

5.1.2. After the North Gauteng High Court granted an order for the tender to be remitted back to the Department for re-adjudication, the Department then appointed Safarmex on a month to month contract on 10 September 2010.
5.1.3. It was not disputed that the month to month contract was entered into after the court had granted an order for the tender of management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to be re-adjudicated.

5.1.4. The temporary contract was entered into on 05 September 2011, signed by both parties at Middleburg. Dr JJ Mahlangu, former HOD represented the Department and J.M.F.F. Graca represented Safarmex.

*Issues in dispute*

5.1.5. It is disputed whether the Department appointed Safarmex on a month to month contract for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010, in a proper manner.

5.1.6. The Complainant alleged that the Department irregularly awarded the tender for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex on a month to month basis. This tender was initially advertised as Bid HEAL/024/10 in 2010 and was awarded to Safarmex to run for a period of three years. However, the awarding of the said tender was challenged in Court and the re-adjudication of the tender was ordered. That is when the Department resorted to awarding a month to month contract to Safarmex in September 2010.

5.1.7. The Department refuted the above allegation made by the Complainant and in an email dated 8 November 2017 addressed to my investigation team, Ms Shamila Rana of the Legal Department, stated the following:

"When we were interdicted to stop the Pharmaceutical contract with Safarmex, the Department set up a team to discuss whether the Department will be able
to do the distribution of the pharmaceuticals ourselves. The then HOD and the Pharmaceutical head Sibongile drove the team. The courts were also requested if a temporary month to month contract could be entered into and they indicated that would be up to the Department to decide on how to go further. As I indicated the Department looked at the possibility of managing the matter by ourselves but the magnitude of what was required was too great and the importance of the actual service required was too important to fail as lives were at stake. After this the Department decided to enter into the month to month with Safarmex. I cannot say why it went on for the length of time as it would be determined by the tender processes thereafter. This is in accordance with my recollection of the case at hand.”

5.1.8. On 27 October 2016, the Department submitted a temporary Service Level Agreement to my investigation team, signed on 5 September 2011 between the Department and Safarmex. The agreement was on a month to month basis and was to commence on 5 September 2011 until the finalisation of the court process.

The agreement stated under its preamble that “whereas the PRINCIPAL is in a court process with Amalgamated Logistics Mpumalanga (Pty) Ltd challenging the decision of the appointment to a new Contractor on the HEAL tender. Whereas the services under this tender needs to proceed pending the finalization of the court processes a temporary contract has to be entered into to ensure service delivery is not interrupted”.

5.1.9. It should be noted that the former HOD, Dr JJ Mahlangu signed the Service Level Agreement entered into on 5 September 2011 between the Department and Safarmex. In an attempt to interview Dr JJ Mahlangu, my investigation team contacted him on 10 July 2019 at 082 653 0205 to schedule a meeting with him. He however mentioned that he was busy at Baragwanath Hospital and that he
would revert back to my team later the same day to confirm a date of the meeting. Dr Mahlangu never got back to my investigation team as promised and my team tried to follow up with him on 11 July 2019 without success. A short message service was forwarded to his cellphone by my team requesting him to respond with a possible date of the meeting but no response was received.

5.1.10. The Department submitted a letter of appointment to Safarmex, dated 13 September 2010, which stated that because of the court proceedings, the Department would continue with the appointment of the service provider on a month to month contract.

5.1.11. In a letter dated 7 October 2013 the Department informed Safarmex that they had started the process of re-adjudicating the tender and that the month to month contract would be terminated once the adjudication process had been finalised and a successful tenderer has been appointed.

Application of relevant legal prescripts

5.1.12. Section 195(1) of the Constitution, 1996 provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires, inter alia, a high standard of professional ethics and accountable public administration which is impartial, fair and transparent.

5.1.13. The process followed by the Department in the appointment of Safarmex on a month-to-month contract was expected to be transparent, fair and without bias. A high standard of professional ethics and fairness dictates that proper procurement processes be followed. Failure to do so by the Department would amount to the contravention of the principles and values espoused in section 195 of the Constitution.
5.1.14. Section 81(1) of the PFMA provides that:

“(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer willfully or negligently-

(a) …

(b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.”

5.1.15. In terms of section 81(1) of the PFMA, Dr JJ Mahlangu and Mr MR Mnisi, as the former Accounting Officers and the current Accounting Officer, Dr S. Mahangi, were expected to take appropriate steps to prevent unauthorised, irregular or fruitless and wasteful expenditure in the Department’s engagements with Safarmex, especially with the month to month contracts, more so after the Court had granted an order for the tender to be re-adjudicated. Failure to do so would be a violation of the PFMA.

5.1.16. Section 84 of the PFMA states that “a charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official…”

5.1.17. The above section makes provision for an investigation on a charge of financial misconduct to be conducted against an accounting officer, as stipulated in section 81 of the PFMA.
5.1.18. Section 85 of the PFMA empowers the Minister of Finance to make regulations on financial misconduct procedures.

5.1.19. Paragraph 4.1.3 of the Treasury Regulations issued in terms of the PFMA provides that:

"If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable and the agreements applicable in the public service"

5.1.20. Paragraph 6.1 of the Department’s Procurement Policy no. P/01/2017, approved by the HOD, Dr S. Mohangi on 22 September 2017 states that:

“Awards of purchases must be made on the basis of the lowest acceptable offer which is in accordance with specification, is commercially, technically and financially acceptable and in the best interest of the Department of Health. All bids must be subjected to the Department of Health preferential point’s adjudication”.

5.1.21. In awarding the tender to Safermex, the Department was expected to appoint a bidder that was either the highest ranking in terms of scoring or offered the lowest price, which does not seem to have been the case. Amalgamated Logistics Mpumalanga (Pty) Ltd and Vuna Healthcare Logistics achieved higher scores on the Department’s scoring system and at a lower price than that offered by Safermex.
5.1.22. Paragraph 20.13 of the Procurement Policy defines fruitless and wasteful expenditure as follows:

"Fruitless and wasteful expenditure means expenditure which was in vain and would have been avoided had reasonable care been exercised".

5.1.23. Had the former HOD, Dr JJ Mahlangu taken reasonable care in ensuring that proper measures are put in place to prevent any fruitless and wasteful expenditure, the Department would not have incurred any fruitless and wasteful expenditure after it entered into a month to month contract with Safarmex.

5.1.24. Section 217(1) of the Constitution provides that when an organ of state (which includes a provincial sphere of government), contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

5.1.25. According to the above section which is supported by section 38(1)(a)(i)(iii) of the PFMA, Dr Mahlangu, Mr Mnisi and the current HOD were expected to ensure *inter alia*, that the Department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Failure to do so would be a violation of the PFMA provisions. It was also expected of the former HODs and the current HOD to also take appropriate steps to prevent unauthorised, irregular, and fruitless and wasteful expenditure.

5.1.26. The appointment of Safarmex on a month-to-month contract cannot be said to have been done in a manner which is fair, equitable, transparent, competitive and cost-effective. After the court granted an order prohibiting the Department from appointing Safarmex, the Department continued to appoint Safarmex on a month-to-month contract without following the procurement procedures. The
Department and Safarmex simply entered into a Service Level Agreement for a month-to-month contract.

5.1.27. Rule 49(11) of the Uniform Rules of Court states the following:

"Where an appeal has been noted or an application for the leave to appeal against or to rescind, correct and review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party directs otherwise”

5.1.28. The implication of the above is that where leave to appeal has been noted for an order made by the Court, the operation and execution of the order made shall be suspended pending the decision of the appeal. The successful appeal by the Department against the order made by the court to cancel the month-to-month contract was suspended pending the decision of such appeal.

Conclusion

5.1.29. Based on the evidence in my possession, it can be concluded that the appointment of Safarmex on a month-to-month basis was not in compliance with the Constitutional principles governing public bodies and Department's procurement policy.

5.1.30. It can also be concluded that the decision by the Department to continue utilising the services of Safarmex was not in compliance with the order of court and the Department should have followed the normal procurement procedure in appointing a service provider for a month-to-month contract.
5.2. **Regarding whether the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter.**

*Common cause issues*

5.2.1. The North Gauteng High Court granted an order on 28 September 2010 that remitted the tender to the Department for re-consideration. The Department then took a decision to appoint Safarmex on a month to month contract on 13 September 2010 but concluded a Service Level Agreement (SLA) on 05 September 2011. This contract lasted for five (5) years. Another month to month contract with Safarmex was signed on 20 October 2015 which lasted for two (2) years.

5.2.2. The Department applied for leave to appeal the decision of the High Court to remit the tender to the Department for re-consideration, in the North Gauteng High Court, in the Supreme Court of Appeal and the Constitutional Court. In all instances the court ordered against the Safarmex agreement.

5.2.3. The Department was appealing the order granted by Acting Justice Goodey preventing the Department from utilizing Safarmex to render its services on a month to month basis.

*Issues in dispute*

5.2.4. It was stated by the Complainant that the Department, as an organ of state, is required by case law to litigate responsibly and in good faith to justify the use of public funds in such an endeavor. The Complainant further stated that the litigation undertaken by the Department was irresponsible and wasteful. He alleged that the Department was not successful in obtaining leave to appeal on the threshold that another judge may reasonably come to a different finding.
5.2.5. It was further alleged that having failed in approaching the full bench of the High Court for leave to appeal, the Department then petitioned the Supreme Court of Appeal. That this is an extraordinary remedy that may only be considered in exceptional circumstances and the Supreme Court of Appeal refused the Department’s petition.

5.2.6. No response was received from the Department refuting the above allegation, however, evidence in my possession revealed that the Department continued to litigate because the learned Judge erred in finding that the actual pricing benchmark was arrived at without a proper reasoned determination of its necessity. Further that the learned Judge ought to have found that the non-disclosure of the benchmark price did not render the process to be unfair for that reason.

5.2.7. Evidence obtained indicates that on 19 August 2010 Amalgamated Logistics Mpumalanga (Pty) Ltd (Amalgamated Logistics) interdicted the Department from implementing Bid no. HEAL/024/10/MP pending the final determination of the review application to be instituted and the MEC to provide all bids submitted under Bid no. HEAL/024/10/MP and written reasons for the MEC’s decision not to award the tender to Amalgamated Logistics.

5.2.8. On 26 August 2010 the court ordered the former MEC for Health (the MEC), Ms Dikeledi Mahlangu to provide the requested documents and suspend the implementation of tender no. HEAL/024/10/MP by 30 August 2010. It was further ordered that the implementation of Bid no HEAL/024/10/MP be suspended until 6 September 2010.

5.2.9. It was evident that on 8 September 2010 Amalgamated Logistics launched a second urgent application to interdict the MEC from utilising Safarmex to render services of procurement, warehousing and distribution of pharmaceutical and
surgical sundries, pending the finalisation of the review application by Amalgamated Logistics.

5.2.10. On 28 September 2010 the Court granted the order in favour of Amalgamated Logistics and the MEC was ordered to stop utilising Safarmex to render services of procurement, warehousing and distribution of pharmaceutical and surgical sundries.

5.2.11. The MEC and Safarmex both appealed the abovementioned court order on 19 October 2010 of which leave to appeal was granted on 19 October 2010.

5.2.12. After leave to appeal was granted, the order preventing Safarmex from rendering services of procurement, warehousing and distribution of pharmaceutical and surgical sundries, was suspended by Rule 49(11) of the Uniform Rules of Court.

5.2.13. Vuna Healthcare Logistics also made an application to court on 1 February 2011, to set aside the award by the MEC of tender no. HEAL/024/10/MP to Safarmex. The High Court ordered that the tender be remitted back to the Department for re-consideration.

5.2.14. On 8 August 2012 the Department made an application for leave to appeal the decision of the Court in the North Gauteng High Court. The leave to appeal was dismissed by the North Gauteng High Court.

5.2.15. The Department further made an application for leave to appeal in the Supreme Court of Appeal (SCA). The leave to appeal was also dismissed by the SCA on 28 November 2012, and
5.2.16. After the decision of the SCA, an application for leave to appeal to the Constitutional Court was made by the Department and it was also dismissed.

Application of relevant law

5.2.17. The PFMA defines fruitless and wasteful expenditure as follows:

'fruitless and wasteful expenditure' means expenditure which was made in vain and would have been avoided had reasonable care been exercised;

5.2.18. By continuing to litigate against the order of the court, the Department incurred expenditure which was in vain and would have been avoided had it enforced the initial court order to re-adjudicate the tender.

5.2.19. Section 38(1)(b) and (c) of the Public Finance Management Act (PFMA) states that the accounting officer for a department:

“(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department…

(c) must take effective and appropriate steps to -

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically”.

5.2.20. In terms of section 38(1)(a)(ii) of the PFMA, the HOD was expected to ensure that the Department used the resources effectively, efficiently, economically and transparently during the procurement of services for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries, failure to do so would be a violation of the PFMA. It was also expected
of the HOD to take appropriate steps to prevent unauthorised, irregular and fruitless expenditure. However, the continuous engagement in litigating the matter is an action that cannot be said to prevent unauthorised, irregular and fruitless and wasteful expenditure but rather encouraged and perpetuated it.

5.2.21. Chapter 10 of the PFMA regulates the financial misconduct committed by the officials in departments. Section 81(1)(b) of the PFMA states as follows:

"the accounting authority of a department commits an act of financial misconduct if that accounting officer willfully or negligently-

makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure".

5.2.22. The HOD who authorised and approved the continued litigation was expected to ensure that the initial tender was re-considered within a reasonable period as ordered by the North Gauteng High Court in September 2010. In the meantime the HOD was also expected to ensure that a proper process was followed in appointing the service provider for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries service on a month to month basis.

5.2.23. Section 85 of the PFMA empowers the Minister of Finance to make regulations on financial misconduct procedures.

5.2.24. Paragraph 4.1.3 of the Treasury Regulations issued in terms of the PFMA provides that:

"If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the
matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable and the agreements applicable in the public service”.

Conclusion

5.2.25. Based on the evidence obtained above, it can be concluded that the Department’s decision to continue with litigation which resulted in the Department’s leave to appeals to all three Courts (North Gauteng High Court, SCA and the Constitutional Court) being dismissed, was not in compliance with section 38(1)(c)(ii) of the PFMA.

5.2.26. It can also be concluded that had the Department re-adjudicated the tender as initially ordered by the court, the fruitless and wasteful expenditure could have been avoided. It can furthermore be concluded that the continued litigation on the matter was not in the interest of service delivery or that of the Department.

5.3. Regarding whether the Department irregularly awarded tender number HEAL/024/15/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex in 2015:

Common cause issues

5.3.1. The Department submitted a Bid Bulletin Volume No: 226, dated June 2015, with the advertisement for tender HEAL/024/15/MP for the outsourcing of the management of procurement, warehousing and distribution of pharmaceuticals and surgical sundries for the Department of Health for a period of three (3) years with the closing date of 21 July 2015 at 13.85% to 25%. No exact figure was provided and BUT only the percentages.
5.3.2. After the tender was re-adjudicated, the Bid Adjudication Committee (the BAC) recommended that the tender be awarded to Safarmex for a period of three (3) years.

5.3.3. The BAC’s recommendation was approved by the then Acting Head of Department, Dr. S Mohangi, who is the current Head of Department, on 17 September 2015.

*Issues in dispute*

5.3.4. The Complainant alleged that the Department again irregularly awarded the tender to Safarmex in 2015 because the company was not properly scored by the Bid Evaluation Committee (the BEC).

5.3.5. In a response provided to my investigation team on 27 October 2017, the Department disputed the allegation by providing supporting documents of the process that was followed in appointing Safarmex.

5.3.6. The Department’s bid specifications for the outsourcing of the management of procurement, warehousing and distribution of pharmaceuticals and surgical sundries for the Department of Health for a period of three (3) years stated a list of requirements. Included in that list is the requirement that bidders must submit a list of contactable references for similar work undertaken for the past five (5) years.

5.3.7. The bid Specifications also state that the bids would be evaluated and adjudicated using the 90/10 point system, further that responsive bids would first be evaluated on functionality and bidders who score a minimum of 70% on functionality would be evaluated further on price and B-BBEE status level of contribution.
5.3.8. It further stated that bidders who score less than the minimum threshold of 70% on functionality would be disqualified automatically.

5.3.9. However, the Department did not provide my investigation team with the minutes of the Bid Evaluation Committee. In a letter dated 14 October 2016 the Department stated the following:

"The report of the Bid Evaluation Committee was previously used as minutes of the committee. Details of discussions were not recorded, however the process has since been rectified for all meeting thereafter"

5.3.10. The Bid Evaluation Report submitted by the Department states that four (4) bidders responded to the advertisement. The list of the bids received on the closing date and the tender amounts or rates are as follows:

<table>
<thead>
<tr>
<th>No.</th>
<th>Name of Bidder</th>
<th>Percentage/ Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Inomed (Pty) Ltd</td>
<td>16% to 30%</td>
</tr>
<tr>
<td>2.</td>
<td>N and N Medical Supplies and Management</td>
<td>R0.00</td>
</tr>
<tr>
<td>3.</td>
<td>Safarmex (Pty) Ltd</td>
<td>13.85% to 25%</td>
</tr>
<tr>
<td>4.</td>
<td>Vuna Healthcare Logistics (Mpumalanga) (Pty) Ltd</td>
<td>Rates</td>
</tr>
</tbody>
</table>

5.3.11. The Bid Evaluation committee stated in its report that the acceptable bids were from Inomed (Pty) Ltd, Safarmex (Pty) Ltd and Vuna Healthcare Logistics (Mpumalanga) (Pty) Ltd.

5.3.12. The Bidders were awarded the following scores for functionality by the committee:
No. | Name of Bidder                                      | Score |
----|---------------------------------------------------|-------|
1.  | Inomed (Pty) Ltd                                  | 44.25 |
2.  | Vuna Health Logistics (Mpumalanga) (Pty) Ltd      | 63.00 |
3.  | Safarmex (Pty) Ltd                                | 70.00 |

5.3.13. Inomed (Pty) Ltd and Vuna Health Logistics (Mpumalanga) (Pty) Ltd were disqualified as they scored below the threshold of 70 points for functionality.

5.3.14. The committee awarded Safarmex ninety (90) points for price and five (5) points for B-BBEE status. The total points allocated to Safarmex was ninety-five (95) points. The Bid Evaluation Committee recommended that tender HEAL/024/15/MP be awarded to Safarmex at 13.85% to 25% as per total bid price all inclusive.

5.3.15. The Bid Adjudication Committee approved the recommendation of the Bid Evaluation Committee and also recommended the appointment to the then Acting Head of Department. The committee stated the following:

"Recommended that Safarmex (Pty) Ltd be appointed at the tendered rates as they scored the highest points and is the only supplier that scored 70 points for functionality"

5.3.16. Dr Mohangi approved the appointment of Safarmex on 17 September 2015.

5.3.17. The Department submitted an appointment letter to Safarmex dated 19 September 2015 and Safarmex accepted the appointment in a letter dated 23 September 2015. The Service Level Agreement between the Department and Safarmex was signed on 20 and 21 October 2015.
5.3.18. On 22 June 2016 the Auditor General South Africa (AGSA) submitted an audit report titled *Communication of internal control deficiencies identified the regularity audit of the Mpumalanga Department of Health for the year ended 31 March 2016*.

5.3.19. The report relayed the following conclusion:

"*From the above detailed findings the following can be summarized:*

AGSA reviewed the procurement process in awarding the contract HEAL/024/15/MP to Safarmex and noted the following non-compliance or contravention of laws and regulations in the awarding of the contract:

(a) Treasury regulation section 16A6.3(c) by not advertising in at least the Government Tender Bulletin for a minimum period of 21 days before closure.

(b) Preferential Procurement Regulation (PPR) 4(5) by not evaluating all tenders that have achieved the minimum qualification score for functionality in terms of the preference points system as prescribed.

(d) The SCM policy of the department dated 23 June 2015 relating to the constitution of the Bid Specification Committee.

(e) Code of Conduct for BAC members by not ensuring the scoring has been fair, consistent and correctly calculated and applied.

*It was also further identified that the bidder made a misrepresentation on the SBD 4 and SBD 9 forms. There is also a possibility of collusive tendering.*

5.3.20. The following recommendations were made to the Department:
1. Contravention of the procurement legislation, regulations and practice notes, constitutes irregular expenditure and must be treated in terms of section 38 and section 81 of the PFMA.

2. SBD 9, section 2 provides that the bid should be disqualified if the certificate is found not to be true and complete in every aspect.

3. The risks of collusive tendering that were identified due to the possible restrictive horizontal relationship that exists between Safarmex and Inomed should be investigated and reported to the Competition Commission.

5.3.21. In a letter dated 24 June 2016, Ian Small-Smith an Attorney for the Department provided a legal opinion on the findings of the Auditor General and made recommendations in his report. He stated the following as his final recommendation:

"10. ...when I review all the findings of the AG it is my recommendation that this tender be re-advertised in the spirit of transparency and good governmental governance. In totality there are too many negative findings which have to be addressed and explained by the state and the just and responsible approach should be to re-advertise the tender.

11. It is further recommended that to ensure that this essential and critical service in terms of the tender not be interrupted the tender should be awarded on a month to month basis pending re-advertisement and the awarding of a service provider.

12. It is also recommended that the DoH instruct an investigation into this process and for the investigators to report on any irregularities by any of the companies or government officials"
5.3.22. On 30 June 2016 the Department cancelled contract HEAL/024/15/MP. The letter stated the reason for cancellation as:

"The Auditor General has audited the procurement process for this bid and has raised findings which warrant the cancellation of this contract so that the process can be started afresh"

5.3.23. Following recommendations made by Mr Ian Small-Smith, on 01 July 2016 the Department’s Chief Financial Officer requested that the approval for deviation from normal procurement procedures to appoint Safarmex to continue with the Management of Procurement, Warehousing and Distribution of Pharmaceuticals and Surgical Sundries and the Supply of Information for the Department on a month to month basis be approved until a new service provider is appointed or for a period of eight (8) months, whichever comes first.

5.3.24. In the Memorandum, the CFO notes that there should never be any disruption in terms of supply of medication to institutions. He further stated that the procurement processes will take between six to eight months to be completed and it is for that reason that Safarmex (Pty) Ltd should be requested to continue rendering the services on a month to month basis until the bidding process is complete or for a period of eight (8) months, whichever comes first. This request was done in terms of Treasury Regulation 16A6.4.

5.3.25. The CFO further stated that “Safarmex (Pty) Ltd is the service provider that is currently on site and therefore it would not be possible to request any other supplier to render the services during the period when the Department is finalizing the procurement processes since that will require setting up of new systems by whoever would be the new service provider”.

5.3.26. The request for deviation was approved by Dr Mohangi.
5.3.27. In a letter dated 31 May 2017 the Department stated that upon the expiry of the eight (8) month contract, the Department further entered into a month to month contract with Safarmex (Pty) Ltd until the finalisation of the investigation.

5.3.28. In the said letter the Department stated that subsequent to the submission of the documents and information that was requested by my investigation team, a legal opinion was requested as the Department was concerned about whether it may not be exposed to legal risk in relation to the bid that was advertised in the Mpumalanga Supply Chain Management Tender Bulletin Volume Number 245 published on 7 November 2016 with closing date of 8 December 2016 by either awarding it or not awarding it. This resulted in the advertised bid being withdrawn.

5.3.29. In a meeting held between my investigation team and the Department on 30 May 2017, the Department was advised to proceed with the advertising and awarding of a new bid for the outsourcing of the management of procurement, warehousing and distribution of pharmaceuticals and surgical sundries and management of information.

5.3.30. The Department advertised the bid in the Mpumalanga Supply Chain Management Tender Bulletin Volume Number 262 published on 09 February 2018 with closing date of 19 March 2018.

Application of relevant law

5.3.31. Section 217(1) of the Constitution provides that when an organ of state (which includes a provincial sphere of government), contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
5.3.32. The above section is supported by section 38(1)(a)(iii) of the PFMA which also provides, *inter alia*, that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.3.33. The implication of the above provisions is that the Department is required by law to adhere to all procurement processes and procedures to ensure that tenders are awarded in a fair, transparent, equitable and cost-effective manner. The awarding of the tender to Safarmex was not in accordance with a fair, transparent and equitable process.

5.3.34. The PFMA defines irregular expenditure as follows:

*Irregular expenditure* means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.3.35. The failure by the Department to follow proper procurement processes in awarding the tender to Safermex is not in accordance with the requirements of the PFMA, as provided by section 38.

5.3.36. Section 38(h)(ii) and (iii) of the Public Finance Management Act states the following:

"38. General responsibilities of accounting officers.

(1) The accounting officer for a department, trading entity or constitutional institution -

..."
(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who –
(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or
(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure...”

5.3.37. The implication of the above is that the accounting officer must take steps to discipline any official in the Department who commits an act that challenges the financial management and internal control of the Department and any person who permits irregular or fruitless and wasteful expenditure.

5.3.38. Paragraph 9.1 of the Department’s Procurement Policy states that:

“In addition to advertising bids and publishing awards on the eTender Publication Portal, Accounting Officer of departments are required to comply with Chapter 16A of the Treasury Regulations by advertising bids and publishing awards as prescribed in Treasury Regulation 16A6.3 (c) and (d) respectively”.

5.3.39. The Department advertised the tender HEAL/024/15/MP but not in accordance with treasury regulation section 16A6.3(c) which requires the Department to advertise for at least 21 days before closure in the Government Tender Bulletin.

5.3.40. Paragraph 4.12 of the Department of Health Procurement Policy dated 23 June 2015 (the Procurement Policy), defines fruitless and wasteful expenditure as follows:

“Fruitless and wasteful expenditure means expenditure which was in vain and would have been avoided had reasonable care been exercised".
5.3.41. Had the current HOD, Dr S Mohangi, who was the Acting HOD at the time, taken reasonable care in ensuring that proper measures were put in place to prevent any fruitless and wasteful expenditure, the Department would not have incurred any fruitless and wasteful expenditure after it failed to follow proper procurement processes.

Conclusion

5.3.42. Based on the evidence obtained above, it can be concluded that the decision to award the tender to Safarmex was not in compliance section 38(h)(ii)(iii) of the PFMA nor was it in compliance with the Department's Procurement Policy.

5.4. Regarding whether Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the Department and any other bidder suffered prejudice as a result of the conduct of the Department.

Common cause issues

5.4.1. It is common cause that the Department entered into a month to month contract with Safarmex on 10 September 2010 after the court had ordered that tender HEAL/024/10/MP be re-adjudicated.

5.4.2. The month to month contract ran for a period of five (5) years and three (3) months when the duration of tender HEAL/024/10 was supposed to run for only three (3) years and it was for an amount of R6 217 000.00. However, with the month to month contract the Department expended a total amount of R653 772 526.90 for the five (5) years.

5.4.3. In 2015, the Department again entered into another month to month contract with Safarmex after tender HEAL/024/15/MP was cancelled after it had been
irregularly awarded to Safarmex. The month to month contract ran for a period of two (2) years and 10 months for an amount of R386 752 735.47.

5.4.4. It is further not disputed that the Department engaged in litigation against the first court order in 2010 to re-adjudicate tender HEAL/024/10/MP. The appeal processes ended up in the Constitutional Court and in all instances the appeal against the order did not succeed.

Issues in dispute

5.4.5. The Complainant argued that the Department awarded tender number HEAL/024/10 to Safarmex, a bidder that was neither the highest ranking nor offered the best price. The Complainant added that Amalgamated Logistics achieved higher scores on the Department’s scoring system and at a lower price than that offered by Safarmex.

5.4.6. The Complainant further stated that this tender was awarded to Safarmex to run for a period of three years. However, Amalgamated Logistics challenged the awarding of this tender in Court and the re-adjudication of the tender was then ordered. In spite of the above judgement the Department insisted on contracting Safarmex in September 2010 on a month to month basis.

5.4.7. The Department refuted the above allegations and in an email dated 8 November 2017 to my investigation team, Ms Shamila Rana of the Legal Services of the Department, stated that the Department also requested if a temporary month to month contract could be entered into and the court indicated that it would be up to the Department to decide on how to go further. She added that thereafter the Department decided to enter into a month to month contract with Safarmex but could not say why the contract went on for such a long time.
5.4.8. The Complainant further alleged that after the tender was re-advertised as HEAL/024/15/MP in 2015, the Department irregularly awarded the tender to Safermex again.

5.4.9. The above allegation was supported by findings of AGSA and the legal opinion provided by Mr Ian Small-Smith, an Attorney who was requested by the Department to provide a legal opinion which was issued on 24 June 2016. He recommended the following to the Department:

(a) Based on the Auditor General's findings, that this tender be re-advertised in the spirit of transparency and good governmental governance as there were too many negative findings.

(b) That this essential and critical service in terms of the tender should not be interrupted, the tender should be awarded on a month to month basis pending re-advertisement and the awarding of a service provider.

(c) Further that the DOH instruct an investigation into this process and for the investigators to report on any irregularities by any of the companies or government officials.

5.4.10. Tender HEAL/024/15/MP was then cancelled on 30 June 2016. For the 2010 month to month contract the Department spent R653 772 526.90 and for the 2015 month to month contract also signed with Safermex, the Department spent R386 752 135.47. All that the Department had to do was to re-adjudicate the HEAL/024/10/MP tender as was ordered by the court. However, the Department decided to re-advertise the tender in 2015 and the tender was again irregularly awarded to Safermex.

Application of relevant law
5.4.11. Paragraph 2 of the 2015 Procurement Policy of the Department, sets out ethical and sound procurement practices to be followed by all staff involved in procuring goods and services and to ensure value for money.

5.4.12. The Department including the former HOD was expected to ensure that correct procurement processes were followed in the appointment of Safarmex on a month to month basis. The Department was also expected to re-adjudicate tender HEAL/024/10/MP and avoid continuous litigation. The appointment of any service provider without following the prescribed procurement processes would result in the Department incurring irregular, unauthorised and fruitless and wasteful expenditure.

5.4.13. The Department advertised tender HEAL/024/10/MP in 2010 and irregularly awarded it to Safarmex, a decision which was set aside by the North Gauteng High Court. The former HOD, Dr JJ Mahlagu then entered into a month to month contract with Safermex, an act which became prejudicial to the Department to an amount of R653 772 526.90. After the tender was re-adjudicated and again irregularly awarded to Safarmex, the Department entered into another month to month contract with Safarmex amounting to R386 752 135.47. Had the former HOD acted properly and adhered to the court order, the Department would not have spent a total of R1 040 524 662.37 just on month to month contracts.

5.4.14. Section 38(1)(a) and (b) of the PFMA as discussed in paragraphs 5.2.19, 5.2.20 and 5.3.31 above are also applicable here.

5.4.15. Vuna Healthcare Logistics (Mpumalanga) (Pty) Ltd and Amalgamated Logistics Mpumalanga (Pty) Ltd were financially prejudiced by the Department’s decision not to re-adjudicate tender HEAL/024/10/MP within a reasonable period of time and the decision to irregularly award tender HEAL/024/15/MP to Safarmex, respectively.
Conclusions

5.4.16. Based on the evidence obtained above, it can be concluded that the Department’s decision to continue litigating, was not in compliance with the Procurement Policy of the Department and section 38(1)(c)(ii) of the PFMA as it prejudiced both the Department and the other bidders.

5.4.17. It can also be concluded that had proper procurement processes been followed by the former HOD, the Department would not have suffered any financial misconduct and the other bidders, being Amalgamated Logistics Mpumalanga (Pty) Ltd and Vuna Healthcare Logistics, would have received a fair opportunity for their bids to be re-evaluated. However, the conduct of the former HOD, resulted in loss of tendering opportunities to the bidders.

6. FINDINGS

Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Department should have complied with and the impact on the Complainant, I therefore make the following findings:

6.1. Regarding whether the Department irregularly appointed Safarmex on a month-to-month contract for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010.

6.1.1. The allegation that the Department irregularly appointed Safarmex on a month-to-month contract to render management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2010, is substantiated.
6.1.2. The Department failed to re-adjudicate the tender as was ordered by the court but focussed on the continued litigation in order to justify its decision to appoint Safarmex on a month to month basis. It was therefore unlawful for the Department to continue utilizing the services of Safarmex after the court had declared the processes followed in appointing Safarmex irregular.

6.1.3. The Department’s failure to follow the normal procurement procedure in appointing a service provider on a month-to-month contract was in contravention of section 217(1) of the Constitution and section 38(1)(a)(iii) of the PFMA.

6.1.4. The Department’s failure to re-adjudicate the tender for more than seven (7) years i.e. from 2010 until 2018 is in violation of the Order of the High Court.

6.1.5. The conduct of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2. **Regarding whether the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter.**

6.2.1. The allegation that the Department incurred fruitless and wasteful expenditure by continuing to litigate on the matter, is substantiated.

6.2.2. The Department’s continuous litigation which involved several applications for leave to appeal to all three Courts (North Gauteng High Court, Supreme Court to Appeal and the Constitutional Court) being dismissed with costs including costs of Counsel, resulted in the Department having to incur fruitless and wasteful expenditures which could have been avoided.
6.2.3. Therefore, the Department’s conduct contravened Section 38(1)(c)(ii) of the PFMA which required the Accounting Officer to ensure that fruitless and wasteful expenditures is prevented.

6.2.4. Such conduct also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3. **Regarding whether the Department irregularly awarded tender number HEAL/024/15/MP for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries to Safarmex in 2015.**

6.3.1. The allegation that the Department irregularly appointed Safarmex on a tender for the management of warehousing, procurement and distribution of pharmaceutical and surgical sundries in 2015, is substantiated.

6.3.2. As confirmed by the Auditor General, the tender for bid number HEAL/024/15/MP was not properly advertised, evaluated and scored. The Auditor General’s findings together with the legal opinion and the recommendations of Mr Ian Small-Smith led to the cancellation of the tender awarded to Safarmex.

6.3.3. In appointing Safarmex, failure by the Department to advertise the tender in the Government Tender Bulletin for a minimum period of 21 days before closure is in violation of Treasury regulation section 16A6.3(c). Also failure to evaluate all tenders that have achieved the minimum qualification score for functionality in terms of the preference points system is in violation of paragraph 4(5) of the Preferential Procurement Regulation.
6.3.4. The conduct of the Department is also in contravention of section 217 of the Constitution and section 38(1)(a)(iii) of the PFMA in that it was against the principle of fairness, equity, transparency, competitiveness and cost-effectiveness.

6.3.5. Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.4. Regarding whether Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the Department and any other bidder suffered prejudice as a result of the conduct of the Department.

6.4.1. The allegation that Amalgamated Logistics Mpumalanga (Pty) Ltd, Vuna Healthcare Logistics, the Department and any other bidder might have suffered prejudice, is substantiated.

6.4.2. The conduct of the Department and in particular the former HODs Dr JJ Mahlangu and Mr Mnisi and the current HOD Dr Mohangi, in the irregular awarding of tenders HEAL/024/10/MP and HEAL/024/15/MP to Safarmex, respectively, on two occasions and the continuous litigation against the court order resulted in the Department having to suffer financial prejudice and the other bidders suffered loss of tendering opportunities. The conduct of the HODs further resulted in the Department having to incur fruitless and wasteful expenditure amounting to a total of R 1 040 524 662.37 in month to month contracts. This amount excludes the litigation costs which is R822 210.71.

6.4.3. The conduct of the Department and particularly those of the HODs was in contravened of its own Procurement Policy and section 38(1)(a)(b) of the PFMA.
by permitting a fruitless and wasteful expenditure, which came as a result of the month to month contracts and continued litigations.

6.4.4. Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMIDIAL ACTION

The appropriate remedial actions I am taking in terms of section 182(1)(c) of the Constitution, with a view of placing the Complainant as close as possible to where she would have been had the improper conduct and maladministration not occurred, is the following:

7.1. The Director General of Mpumalanga Provincial Government must:

7.1.1. Within 60 working days from the date of this report, ensure that an investigation into the irregular expenditure is conducted and that appropriate disciplinary steps are taken against all implicated officials.

7.1.2. Within 30 working days from the date of finalisation of the investigation, ensure that the Department declares the irregular expenditure in their financial statement to the Provincial Treasury.

7.1.3. Within 30 working days of finalisation of the investigation, further ensure that the matter is referred to the Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit in terms of Section 6(4) (c) (ii) of the Public Protector Act for further investigation and recovery of losses.
7.2. The Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit must:

7.2.1. Investigate any alleged criminal conduct against implicated parties for financial mismanagement in violation of the PFMA, especially the litigation costs incurred by the Department and the irregular extension of the month to month contract to Safarmex.

7.2.2. To recover through civil litigation any amount incurred as wasteful and fruitless expenditure from the former HODs Dr JJ Mahlangu and Mr Mnisi and the current HOD Dr Mohangi.

8. MONITORING

8.1. The Director General of Mpumalanga Provincial Government must, within (30) working days from the date of the issuing of this report, submit to my office the implementation plan with timelines indicating how the remedial actions referred to in paragraph 7 above will be implemented.
8.1 I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speake of the National Assembly and Others* [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Head of Department of the Department of Health in Mpumalanga, unless they obtain a Court order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 11/11/2019